Supreme Court of the Republic of Slovenia

Judgement I Up 23/2021

Court: Supreme Court

Department: Administrative department

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Panel: Peter Golob (chair of the panel), Nataša Smrekar (reporter), Marko Prijatelj

Field: CIVIL PROCEDURAL LAW – EU LAW – VISA, ASYLUM, AND IMMIGRATION LAW – ADMINISTRATIVE DISPUTE – HUMAN RIGHTS

Institute: protection of human rights – proceedings of extradition of an alien from the country – the right to asylum – the prohibition of a forced extradition or return – the principle of non-refoulement – the prohibition of collective expulsion – the prohibition of torture and inhuman or degrading treatment – serious risk – application for international protection – asylum seeker – substantive procedural guidance – free assessment of evidence – burden of proof – rejection of the evidence proposed – timely reprimand of procedural infringements – preclusion – contribution – rejection of the appeal

Legal basis:

Conventions, Declarations, Resolutions

EU Charter of Fundamental Rights - Articles 4, 18, 19, 19(1), 19(2), 52, 52(3)

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) - Article 3

EU - Directives, Regulations, Decisions, Agreements, Rules

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person - Articles 3, 3(2)

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals - Articles 1, 6, 6(1)

Republic of Slovenia - Constitution, Laws, Agreements, Treaties

Constitution of the Republic of Slovenia (1991) - URS - Article 18

International Protection Act (2017) - ZMZ-1 - Articles 27, 27(1), 36, 36(1)

Administrative Dispute Act (2006) - ZUS-1 - Articles 4, 4(1), 30, 30(3), 31, 31(1), 33, 33(2), 33(2)-(4), 66

Civil Procedure Act (1999) - ZPP - Articles 8, 224, 224(1), 224(4), 285, 286b, 287, 287(2)

Core

A person's right to apply for protection establishes a requirement for effective, genuine possibilities for the alien to also express this wish. Such possibilities do not exist, however, if an individual has contact with officials in the expedited minor offence proceedings and during police detention, but is not provided with all the information relevant to their (i.e. personal, concrete) legal situation and if the officials, in addition, issue or draw up documents (decisions, records, certificates) in the Slovene language, the content of which the addressee, because of their lack of knowledge of the language, cannot become familiar with without a comprehensive interpretation and can therefore not object to it.

In interpreting Article 4 and Article 19(2) of the Charter, the case-law of the ECtHR must also be considered. This is further confirmed by the Explanations relating to the Charter of Fundamental Rights, which note that the Article 52(3) reference to the ECHR covers the Convention and its Protocols, with the content and scope of the rights guaranteed determined not only by the text of those acts, but also by the case-law of the ECtHR and the CJEU. It is emphasised that the level of protection that the Charter provides must never be lower than the level of protection guaranteed by the ECHR. Regarding the provision of Article 19(2), the Explanations state that the said paragraph incorporates the relevant case-law of the ECtHR on Article 3 ECHR. The CJEU has also regularly pointed out in its judgments that the case-law of the ECtHR on Article 3 ECHR must be considered when interpreting Article 4 of the Charter.

The principle of non-refoulement prohibits both direct refoulement and indirect refoulement, where the asylum seeker is extradited to a State in which, although there is no imminent serious risk that they will be exposed to inhuman treatment, there is a possibility of them being extradited from that State to a State where there is a serious risk that they will be exposed to inhuman treatment.

The principle of non-refoulement therefore ensures that an individual will not be returned to another State without the State authorities having assessed whether that State is safe for them. Given the rebuttable presumption of mutual trust between EU Member States and given that the ECtHR case-law on Article 3 ECHR is taken into account when considering the prohibition set out in Article 19(2) of the Charter, the principle of non-refoulement must also be respected in the context of the implementation of measures between Member States. This in turn imposes an obligation on a Member State not to remove an individual from its territory if there is a risk of conduct constituting a violation of Article 4 of the Charter in the receiving country (EU

Member State), as the CJEU has explicitly confirmed in connection with the transfer of an asylum seeker in the context of the implementation of the Dublin system. Namely, in the joined cases of N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (C-411/10 and C 493/10 of 21 December 2011), it pointed out that it is possible that the transfer of asylum seekers under the Dublin system may not, in certain circumstances, be compatible with the prohibition enshrined in Article 4 of the Charter. It stated that the asylum seeker would be at real risk of inhuman or degrading treatment within the meaning of that Article if they were to be transferred to a Member State where there is a serious risk of systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers. Consequently, in accordance with the prohibition laid down in the said Article, Member States may not carry out a transfer if it is not possible for them no to be aware of such deficiencies in that Member State (paragraphs 86 to 94 and paragraph 106 of the judgment). It further follows from the judgment that the appropriate instruments for assessing whether the responsible Member State respects fundamental right are the data, as those noted by the ECtHR, including regular and coherent reports by international non-governmental organisations that show actual problems in the country of destination (expressly paragraphs 90 and 91 of the judgment).

Since the principle of non-refoulement refers to State measures that require the individual to leave the State's territory, the existence of a real risk that the individual will be exposed to prohibited treatment is assessed in the light of the circumstances that existed at the time the measure was taken and that were known or ought to have been known to the State authorities. Such an approach to assessment also applies in cases where the measure has been carried out, since under the principle at issue the State is responsible for having exposed the individual to a foreseeable risk of unacceptable treatment. This reflects the absolute nature of the right enshrined in Article 3 ECHR, due to which its exercise cannot be left to chance. The State is therefore also obliged to consider and assess the risks that might jeopardise the respect of the values guaranteed by this provision of the ECHR. It follows that it is already in breach of its duty connected with ensuring the respect of the prohibition of torture, inhuman or degrading treatment if, when removing a person from its territory to another State, it incorrectly assesses, based on the information available, the risk of exposure to treatment contrary to Article 3 ECHR, or if it fails to make such an assessment at all.

In this respect, the State's responsibility exists irrespective of whether the person was in fact subsequently exposed to treatment contrary to Article 3 ECHR in the other State. The Supreme Court therefore rejects the appellant's submission that there can be no violation of the principle of non-refoulement because the plaintiff was not exposed to inhuman treatment in Croatia and Bosnia and Herzegovina.

Ruling

I. The appeal is rejected and the judgement under appeal is affirmed.

II. The plaintiff's request for reimbursement of the costs of the appeal proceedings is rejected.

Reasoning

1. The Court of First Instance decided by judgment and order that the lawsuit is to be dismissed in part that relates to the primary claim and the first alternative claim (point I of the ruling of the judgement) and partially upheld the lawsuit in so far as it relates to the second alternative claim. It did so by declaring that the defendant (the Republic of Slovenia) violated the plaintiff's rights to the prohibition of refoulement under Article 19(2) and to collective expulsion under Article 19(1), as well as his right to access to the asylum procedure under Article 18(2) of the European Charter on Fundamental Rights (hereinafter the Charter), by transferring the plaintiff named A. A. (born ..., citizen of Cameroon) on 16 August 2019 at the Vinica border crossing point at 10.00 a.m under an expedited procedure to the Republic of Croatia, based on the Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia regarding the Extradition and Reception of Persons Whose Entry or Residence is Illegal. The Court furthermore ordered the defendant to allow the plaintiff to enter the Republic of Slovenia and apply for international protection without delay after the judgment has become final (point II of the ruling of the judgment). It referred the plaintiff to the relevant court proceedings with regards to damages (point III of the ruling of the judgment) and ordered the defendant to fully reimburse the plaintiff for the costs of the proceedings, which are to be assessed by a separate order (point IV of the ruling of the judgment).

2. It follows from the reasoning of that decision that the plaintiff's right to the prohibition of collective expulsion laid down in Article 19(1) of the Charter was breached because the defendant failed to deflect any doubt as to the fact that the competent police authority did not carry out a valid and objective examination and assessment of the plaintiff's personal (individual) circumstances in the proceedings that concerned him, or rather because the plaintiff did not have the chance to defend himself with arguments against the measure of return/removal from the Republic of Slovenia prior to the extradition proceedings.

3. The breach of the non-refoulement prohibition referred to in Article 19(2) of the Charter is based on the assessment that, in the light of the reports on the situation in Croatia and in Bosnia and Herzegovina (regarding the treatment of returned migrants by the Croatian authorities and the living conditions of migrants in Bosnia and Herzegovina), which were known and publicly available at the time, the defendant was aware of the situation in both States, and should therefore have examined whether the act of returning the plaintiff to Croatia and (on the basis of chain returns) to Bosnia and Herzegovina could have put him in serious danger in terms of the prohibition of inhuman treatment. Having established such a risk, it should (in accordance with the principle of mutual trust between EU Member States) have taken the necessary measures to exclude with certainty the possibility that the right under Article 19(2) of the Charter would be violated in the event of the removal. However, the defendant did not obtain

and assess information on the situation in Croatia and in the reception centres in Bosnia and Herzegovina to which the aliens had taken refuge after their return, nor did it, in these specific circumstances of the demonstrated danger, make enquiries as to whether the Croatian authorities were complying with their obligation to issue a return decision to the aliens returned, in accordance with Article 6(1) of the Return Directive.[1]

4. With regards to the violation of the right of access to asylum, the Court held that the plaintiff had proved sufficiently that he had expressed an intention to seek asylum, while the defendant had not proved the opposite. Concerning this, the Court explained that the possibility of the plaintiff to access international protection should have been evident from the administrative file, through the documented facts that the plaintiff was informed of the possibility of consulting a legal or other consultant, that he had the possibility to communicate in the proceedings with the assistance of an English interpreter, that he had a procedural guarantee to defend his case based on the persecutions in Cameroon or due to the fear of being returned to Croatia or Bosnia and Herzegovina, which would require at the very least that he be informed that he was in the process of being returned to Croatia. As none of the above is evident from the administrative file, the Court expressed its doubts regarding the veracity of the contents of the record of the offender's statement, made on 15 August 2019, that he left his country of origin for economic reasons.

5. The defendant (hereinafter the appellant) appealed against points II and IV of the ruling of the judgment and order. The appellant claims that there has been a substantial breach of procedural provisions, an error of substantive law and an erroneous and incomplete finding of facts. The appellant proposes that the Supreme Court should itself hold a main hearing, take the evidence proposed and amend the judgment and order of the Court by rejecting the lawsuit; or rule without a main hearing in accordance with Article 80(3) of the Administrative Dispute Act (hereinafter ZUS-1); or uphold the appeal, set aside the judgment in the contested part of points II and IV of the ruling of the judgment and refer the case back to the Court of First Instance for a retrial.

6. The plaintiff filed a response to the appeal, in which he requests that the Supreme Court rejects the appeal, upholds the judgment under appeal and orders the appellant to pay the costs of the appeal proceedings.

7. The appeal is not justified.

To point I of the ruling

8. The appellant argues that the Court's summons to the plaintiff made on 26 November 2020 in relation to the claim for a declaration that the right of access to the asylum procedure has been violated, was a summons to amend the claim and that the Court had therefore exceeded its powers in the context of the substantive procedural guidance under Article 285 of the Civil Procedure Act (hereinafter ZPP). It points out that the amendment of the claim is at the plaintiff's disposal and is admissible to the point when the decision of the first instance in the

[1] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

case is made. Moreover, the reply of the plaintiff's counsel was not sent to the appellant for a statement, although such a statement is necessary under Article 185 ZPP.

9. The above reproaches are unjustified. In the Supreme Court's view, the Court of First Instance, by issuing that summons, de facto remedied a formal deficiency in the lawsuit, which arises, inter alia, when the lawsuit seeking a declaration that an act has unlawfully interfered with the plaintiff's human rights or fundamental freedoms, does not contain a claim for the interference with the human rights or fundamental freedoms to be established, remedied or prohibited (Article 30(3) ZUS-1). In the case of an incomplete lawsuit, the plaintiff is required to remedy the deficiencies within a specified period (Article 31(1) ZUS-1).

10. The relevant lawsuit was deficient in form because it did not contain a claim regarding the alleged violation of the right to asylum. In his lawsuit, the plaintiff stated the circumstances and based on them alleged a violation of the mentioned right from Article 18 of the Charter (which was also pointed out by the Supreme Court in its annulment decision I Up 128/2020 of 28 October 2020). He argued that in his extradition to Croatia on 16 October 2019, at the Vinica border crossing point, his previously expressed intention to seek asylum, based on which he should have been treated in accordance with the provisions of the International Protection Act (hereinafter ZMZ-1) and not handed over to another State, was not considered. In connection with this, the lawsuit also sought that he be immediately returned to the Republic of Slovenia, where his intention to apply for asylum would be dealt with in accordance with the provisions of the ZMZ-1. This is a claim for the elimination of the consequences of an act or a committed infringement within the meaning of the fourth indent of Article 33(2) ZUS-1, which by the nature of things follows and is therefore linked to the preliminary ruling on the claim relating to the alleged infringement of a human right.

11. Accordingly, the Court's summons in relation to the alleged violation was not aimed at putting forward other (different) claims in place of the existing ones, but at putting forward a missing request as to how the Court should decide on the lawsuit in relation to the alleged and explained violation of the right of access to international protection. Since there was no amendment of the lawsuit, the appellant's consent within the meaning of Article 185 ZPP was also not required.

12. In the light of the foregoing, there is no merit in the submission that the plaintiff did not argue that there had been a violation of the right to asylum and that the appellant only became aware that the lawsuit had been supplemented after the judgment had been delivered. This statement is in contradiction with the information in the case-file, since the return receipt under reference 356 confirms that the plaintiff's reply, sent in response to the Court's summons, was served on the defendant's counsel (the State Attorney’s Office) on 4 December 2020. Furthermore, it follows from the judgment under appeal (paragraph 189 of the reasoning) that, at the main hearing on 7 December 2020, the Administrative Court, in the context of the report regarding the status of the matter, also clarified the plaintiff’s reply in relation to the claim for a declaration of a violation of the right of access to the asylum procedure.

13. The fact that the Court of the First Instance instead of finding a violation of Article 3 ECHR (the prohibition of torture, inhumane and degrading treatment or punishment) found a violation

of the principle of non-refoulement from Article 19(2) of the Charter, which states that no one may be removed, expelled or extradited to a State where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, doesn't not present a prohibited expansion of the claim. The plaintiff had in fact already argued in his lawsuit that the principle of non-refoulement is derived from the prohibition enshrined in Article 3 ECHR, as well as in the case-law of the ECtHR and the Constitutional Court, and that the State which expels someone must verify whether the intermediate State provides sufficient guarantees to prevent that the person is returned to the subsequent State without a proper assessment of the risk that they would be exposed to torture or similar treatment in that State. The appellant itself also notes (on page 27 of the appeal) that Article 3 ECHR corresponds in substance to Article 19(2) of the Charter.

14. As regards the identity or scope of the claim, it therefore cannot be decisive that in the ruling of the judgment, when specifying the right infringed, the name and designation from the Charter, not from the ECHR, are used, since, on one hand, it corresponds more precisely to the legal definition of the alleged infringement, and, on the other hand, both provisions have a comparable content with the same objective - the protection of the same (absolute) human or fundamental right.

15. The Supreme Court also disagrees that the judgment is incomprehensible and contradicts itself because the Court deliberated the appellant's conduct prior to the plaintiff's extradition to Croatia, nor does it agree with the appellant's conclusion that all the prior acts before extradition were lawful, because they are not mentioned in the ruling the judgment and are not within the scope of the claim. It is clear from the judgment under appeal that, within the scope of the claims, the Court of First Instance deliberated the circumstances of the plaintiff's treatment from the time of his arrest by the police in the Republic of Slovenia until the time of his surrender to the Republic of Croatia, that is to say, the circumstances of the entire procedure before the Slovenian authorities, which ended with the act at the Vinica border crossing point on 16 August 2019. It depended on the aforementioned circumstances whether the contested act of extradition was legal or not, which means that the "prior acts" constitute the factual basis on which the legal assessment of the legality of the contested act of the surrender of the plaintiff within the meaning of Article 4(1) ZUS-1 is based. The description of the facts, however, belongs in the reasoning of the judgment and not in the ruling.

16. The appellant further argues that the relevant judgment is a surprise judgement because the Court did not inform the appellant that it would base its decision on the question of the adequate competence of the police officers to identify potential applicants for international protection and that it would consider the conduct of the defendant in relation to the verification of the situation in Croatia and Bosnia and Herzegovina as decisive.

17. The reproach that the appellant did not know that its verification of the situation in the mentioned States would be relevant to the case is unjustified since the plaintiff also based his lawsuit on the failure of the appellant to fulfil that duty. He argued (paragraph V of the lawsuit) that the appellant had failed to fulfil its obligation under the principle of non-refoulement in regards to verifying the situation in these States, even though at the time there were reports from NGOs, showing that the Croatian authorities were systematically failing to deal with the

transferred persons, and instead deport them to the territory of Bosnia and Herzegovina while also treating them violently and destroying their property. He stated that the State which expels a person must verify whether the intermediate State provides sufficient guarantees to prevent the person from being returned to the subsequent State without assessing the risk of torture or degrading treatment. He also pointed out that in his case, the Slovenian authorities had apparently not carried out such an assessment before handing him over to the Croatian security authorities.

18. As regards the adequate qualification of Slovenian police officers to identify persons in need of international protection, this circumstance, besides the fact that the appellant itself states that this was only one of the findings on which the contested decision regarding the violation of the right to asylum is based, is not essential to the decision. If it had been (but it could not have been, since the plaintiff was found to have expressed an intention and no special 'identification' of his situation was necessary) the judgement would have been a surprise judgment, since the Court, in the context of its substantive procedural guidance**,** did not inform the appellant of its legal view of the dispute, which was different from that which had followed from the lawsuit.

19. Accordingly, the appellant was not deprived of the opportunity to be heard on matters of legal relevance in the proceedings at first instance.

20. The Supreme Court also disagrees that the Court violated the principle of the free assessment of evidence set out in Article 8 ZPP, from which it follows that the Court is not bound by any rules regarding the probative value of individual pieces of evidence when assessing the evidence adduced. An exception is a document issued by a public authority within the limits of its competence (a public document), which is considered to prove the truth of what it affirms or establishes (Article 224(1) ZPP). It is allowed to prove that the facts stated in the public document are not true, or that the document itself is incorrectly drawn up (Article 224(4)). There therefore exists a rebuttable presumption of the truth of the contents of a public document, in the present case the record of the offender’s (plaintiff’s) statement from 15 August 2019, where the said presumption has been rebutted. The Court gave reasons for this (more about this in the reasoning on asylum) and explained at various points in the judgment under appeal (and before that at the main hearing) why it did not take some of the appellant's evidence. The mere fact that the appellant disagrees with the finding of facts cannot, however, justify the alleged procedural breach, nor can it justify the objection of a biased trial.

21. The appellant also believes that the consideration of the NGOs reports on the treatment of migrants in Croatia and Bosnia and Herzegovina constitutes an interference with the jurisdiction of another State and that the Court should have obtained a statement about this from the authorities of the States concerned. This objection is also unjustified, since the deliberation of the facts relating to the treatment of aliens in the States concerned does not in any way interfere with the right of these States to exercise their sovereign authority on their territory. Thus, in paragraph 301 of the reasoning of its judgment, the Court of First Instance also correctly rejected the appellant's reference to the immunity of other States, explaining that no other State was sued in the present case.

Regarding the access to international protection

22. In its decision I Up 128/2020 of 28 October 2020, with which it set aside the first judgment of the Court of First Instance I U 1490/2019-92 of 22 June 2020, the Supreme Court pointed out that that the factual basis of the lawsuit regarding the mentioned right was the statement that the plaintiff had expressed to the police officers his intention to lodge an application (paragraph 17 of the decision). Thus, it was not even disputed in the retrial that the plaintiff is not (was not) a person who would be unaware of the possibility that he could apply for international protection in the Republic of Slovenia. The Court of First Instance's views on the incorrect transposition of the Procedural Directive[2] into ZMZ-1 and related aspects on the duty to train police officers to identify potential applicants for international protection and on informing aliens about the possibility to apply for protection, are therefore irrelevant for the decision. Thus, the Supreme Court did not reply to such allegations made in the appeal.

Objection regarding the erroneous finding of facts

23. The plaintiff's claim that there had been a violation of the right to asylum was based on the allegation that, after his arrest, he had repeatedly expressed to the police officers his wish to apply for international protection in Slovenia but had not been heard. Since a repeatedly expressed intention to apply for international protection is not a condition for establishing a violation of the right of access to the asylum procedure, the finding in the contested judgement, that the plaintiff also expressed that wish during the proceedings at the Črnomelj Police Station on 15 August 2019, is sufficient.

24. It is evident from the reasoning of the judgment under appeal that the Court believed the plaintiff that he had expressed an intention to seek asylum because he claimed to be a member of the persecuted Anglophone community in Cameroon. He also provided documentary evidence of the persecution of members of that community which seeks autonomy (paragraphs 404 and 405 of the reasoning).[3] Moreover, the plaintiff's description of the course of the police proceedings at the police station Črnomelj, conducted because of the illegal crossing of the border and in which he expressed his wish for international protection, which was not considered, did not generally deviate from the description of the police proceedings at the mentioned police station and the police station Metlika, as confirmed in the reports of the Ombudsperson of the Republic of Slovenija/2019, Amnesty International/2019 and the Legal Information Centre/2018. These reports showed that aliens had been returned to Croatia despite having expressed their intention to seek asylum (paragraphs 408 and 438 of the reasoning). It is also evident that the Court did not find any circumstances in favour of the appellant that would show that the procedures are always carried out in a manner which would objectively confirm the acceptance of applications for international protection when they are made. The Court of First Instance pointed out the generally poor or insufficient documentation in the

[2] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[3] Furthermore, it was not disputed at the first instance that the appellant had dealt with a person bearing the plaintiff's name, that the appellant had dealt with him as a Cameroonian national and that the appellant had communicated with him in English, which explains the link with the alleged belonging to the Anglophone minority in Cameroon.

official files (see the Ombudsperson's report, presented when deliberating the principle of non-refoulement in paragraphs 311 and 312 of the judgment under appeal) and found nothing different in the present case, since none of the police records show that the plaintiff had (inter alia) been informed of the possible consequences of crossing the border illegally or of the means of lodging a possible application for protection by being informed in a documented manner that he has the possibility of consulting a counsellor and communicating in the procedure with the assistance of an English interpreter. It is also not evident that he had a procedural guarantee to present his case in relation to the persecution in Cameroon or to the fear of being returned to Croatia and Bosnia and Herzegovina, as for this he should have been informed that he was in the process of being returned to Croatia (paragraph 432 of the reasoning).

25. In this sense, the highlighted deficiencies regarding the documentation of individual acts in the procedure of the treatment of the plaintiff cannot be understood as it appears from the appeal, that is to say, as a reproach that the appellant has failed to fulfil a duty imposed on it by the regulations. This aspect of ensuring the traceability of the performed acts is relevant as evidence since the failure to record in detail which acts were performed, in what manner and with what content (especially when it comes to deciding on interventions that have an effect on the individual's legal position), reduce the State's ability to prove its statements regarding the content of what happened in the proceedings and to disprove with them that the plaintiff (even though on his side there are relevant elements for imminent persecution if returned to the country of origin) has expressed an intention to seek asylum.[4]

26. The appellant disputed the fact that an intention had been expressed, arguing that the plaintiff had left his country of origin (Cameroon) not because of the threat of persecution, but because of his poor economic situation and that his country of destination was France, where he wishes to find employment. It also states in the appeal (page 56) that it has proved that the plaintiff is an economic migrant. Its evidence was the record of the offender's statement from 15 October 2019 drawn up at the police station Črnomelj (paragraph 409 of the reasoning of the judgment under appeal). The appeal therefore also makes an unjustified reference to that record in the part titled “Exceeding the cause of the lawsuit”.

27. Furthermore, it follows from the judgment under appeal that the appellant failed to prove that the plaintiff is an economic migrant by means of the mentioned record, which was drawn up in the minor offence procedure. The Court of First Instance expressed doubts that the plaintiff's statement from the record reflected the real factual situation or that the plaintiff had actually told the police officer who interviewed him what was written in the record (paragraph 434 of the reasoning). The Administrative Court justified this, inter alia, with the way the record was drawn up. In it, it was already noted, next to the personal data of both aliens who were examined together (in addition to the plaintiff, an Iraqi Kurd with whom they had crossed the Croatian-Slovenian border), that they had left the country for economic reasons and that they

[4] For example, it is evident from Asadi and Others v Slovakia, no. 24917/15 of 24 March 2020, that documents signed by the applicants and the interpreter, including transcripts of oral interviews concerning the illegal crossing of the border, were submitted to the ECtHR, with the transcripts showing that the applicants replied with “no” when asked by the police whether they had suffered persecution in their country of origin and whether they wanted to apply for asylum in Slovakia, stating that they had left Afghanistan for economic reasons and that they wanted to go to Germany (para. 7).

intended to find work in European countries – find a job in France, followed by a record of their (joint) statement. In addition, and this is crucial in the Supreme Court's view, it was established that both aliens were dealt with without the presence of a translator or an interpreter, that the communication was in English (only the plaintiff spoke, as the other alien did not speak English), and that the plaintiff did not have access to legal aid regarding the international protection (paragraphs 426 and 435 of the judgment under appeal).

28. As regards the appellant's submissions that the plaintiff was able to follow the offence procedure in his own language, the Supreme Court firstly points out that the purpose of involving a translator or interpreter in the procedure that concerns him and in which his legal position is being decided, is to enable him to follow the procedure in its entirety. Only in this way is he enabled to effectively exercise his procedural rights, including the right to a legal remedy.[5] This aspect is therefore important for the evidentiary assessment of documents used by the party to prove its allegations that the other party was aware of the content of these documents by receiving them, even though they were drafted in a language (Slovene) that the person otherwise does not understand. However, in the Supreme Court's view, all of the above was duly taken into account in the evidentiary assessment of the record of the offender's statement,[6] given that the plaintiff claimed in his lawsuit that he had signed documents, which were drawn up in the Slovene language, and that the police officers had explained to him their purpose, whereas the content had not been orally explained to him, except briefly.

29. The appellant disagrees with the finding of facts as regards the intention to seek asylum and the plaintiff's statement on the record. However, it merely states in passing that the Court should have objectively assessed the documentation connected to the plaintiff's treatment at the police station Črnomelj, but not why the assessment of that document (the record) is incorrect from the view of the party's right to use his own language in the procedure or why the absence of an interpreter in the particular case is not essential, e.g. because the legal provisions on reading and interpreting/translating documents from the Slovene language (a legal public document being evidence of the truth of what it is written in it) were complied with in the drawing up of the record of the offender's statement (and of the other documents). There are no such allegations in the appeal, and the generalised assertion that the oral communication between the plaintiff and the police officers took place in English and that there were no legal impediments to such communication, is not sufficient. Even if the police officers were acting within the meaning of Article 19 of the Act on the Duties and Powers of the Police (hereinafter ZNPPol) based on which, when communicating orally with persons who do not speak Slovene, they may also use another language that the person understands or an interpreter, such oral communication in the relevant language does not by itself mean that the plaintiff was also provided with a sufficient amount of information in that language in view of the requirements

[5] In addition, an interpreter is a third party who can testify in a dispute between an individual and the State about the language that was used during a specific act in the proceedings.

[6] With regards to it, the appellant stated in its reply to the lawsuit that it had been drafted on the basis of Article 55 of the Minor Offences Act (ZP-1), which, in paragraph 3, requires that the contents of the record or the official note is read out to the offender and a copy handed to him or her, which the offender shall confirm by providing his or her signature. If the offender refuses to sign, this shall be recorded in the record or the official note.

of the particular (specifically, offence) procedure and in relation to the acts carried out in that procedure.

30. It should not be overlooked that it was precisely by conducting the offence proceedings (part of which was establishing the reason for the illegal border crossing) and by the plaintiff's statement from this procedure, that the appellant tried to prove his individual treatment in relation to the prohibition of collective expulsion. In so far as that is the case, not only the language that was used in the procedure is relevant, but what is relevant is also what was explained to the plaintiff in that language, that is to say, whether he was given the opportunity to be fully informed about and have control over the content of the acts that concern him in his own language (the meaning and relevance of the plaintiff's signature on the individual documents in the Slovene language also depend on that). From the appellant's submissions that the plaintiff was orally informed in English of the reasons for detention, of the rights of the detainee, of the possibility of informing certain persons about the detention, of the possibility of appealing against the detention during the detention, and of the possibility of appealing against the payment order, it is not apparent that the procedure was conducted in the manner referred to above.

31. The appeal further points out that the procedure regarding the extradition of the plaintiff was not conducted in accordance with the General Administrative Procedure Act (ZUP), since he was not issued a decision regarding the return, and that if the offence procedure was conducted in the wrong language the plaintiff had the possibility of using a legal remedy within the minor offence procedure.

32. These arguments, in so far as they relate to the minor offence procedure, can be upheld on the ground that the order for payment issued to the plaintiff for illegal border crossing cannot be interfered with because the ordinary legal remedy was not used. However, this does not mean that, for the purposes of the administrative dispute at issue and in the light of the subject-matter of the decision, the possibility of using one’s own language as a key element in the evidentiary assessment of an individual document issued in the Slovene language cannot be taken into account, since it was used to prove the plaintiff's ability to protect his legal position against the intended extradition to another State in the procedures.

33. With regards to the plaintiff's access to legal aid in the field of exercising the right to international protection, the appellant refers to a leaflet containing information prepared by the UNHCR and handed out by police officers to aliens. The Court of First Instance did not find that such a leaflet was in fact given to the plaintiff, but only that the leaflets were pasted at police stations. It added that that does not mean that police officers who come into contact with aliens in a similar situation to that of the plaintiff are obliged to inform aliens of that leaflet, or that such a thing happened in the plaintiff's case (paragraphs 251 and 426 of the reasoning).

34. The Supreme Court further finds that the judgment under appeal thus establishes what the appellant's counsel stated at the main hearing on the 7 December 2020, that is that the English leaflet, in which rights and obligations of asylum seekers and migrants are indicated, is available at every police station (document number 359, page 5 of the record of the main hearing). The

appal cannot challenge this by bare assertion that the leaflet is also handed out to aliens in a suitable language.

35. The appellant further argues that, in reaching its decision, the Court of First Instance failed to consider as relevant the appellant’s observations concerning the inconsistencies in the plaintiff's statements, which indicate that he is not credible and that his allegations are not true. However, the appellant does not explain why the discrepancies summarised on page 60 of the appeal are significant and how, when assessed next to other evidence taken, they could affect the overall assessment of the evidence and thus undermine the conclusion that an intention to seek international protection has been expressed. It is therefore not open to appellate review.

36. Furthermore, it is apparent that some of the alleged inconsistencies are not inconsistencies but are rather mere disagreements with the established facts as to the veracity of the plaintiff’s statements. Thus, it is not an inconsistency in the plaintiff's statement that he did not have the opportunity to express his intention, if the appellant contradicts the said statement with the content of the plaintiff’s statement from the record of the offender's statement on 15 August 2019, and attributes to that statement a question which is not in the record (that he was asked about his reasons for leaving his country of origin). At this point, the Supreme Court would therefore add that the right of a person to apply for protection, on the other hand, establishes a requirement of effective, genuine possibilities for the alien to also express this wish. Such possibilities do not exist, however, if an individual has contact with officials in the expedited minor offence proceedings and during police detention, but is not provided with all the information relevant to his (i.e. personal, concrete) legal situation and if the officials, in addition, issue or draw up documents (decisions, records, certificates) in the Slovene language, the content of which the addressee, because of their lack of knowledge of the language, cannot become familiar with without a comprehensive interpretation and can therefore not object to it.

37. It is also, for example, not an inconsistency that the plaintiff did not describe his first crossing of the state border on the 12 April 2019 and the interview at the Ilirska Bistrica police station in his lawsuit, since he filed the lawsuit due to the extradition to the Republic of Croatia after his second arrest. Even so, his first statement on the reasons for leaving Cameroon does not in itself confirm that he also insisted on (repeated) the same statement on the 15 August 2019 in the offence proceedings. Rather, it would more likely be the other way around. If the appellant proved that the plaintiff, on 15 August 2019, has also given economic reasons for leaving Cameroon, this would confirm that the reason why he does not want to return has remained unchanged from the beginning.

38. The Court of First Instance also reasoned why the plaintiff's discrepancies in describing the route from his country of origin to Europe are not important - because they are circumstances that are relevant in the procedure of determining whether the conditions for international protection are met. The appellant’s reproach of the lack of reasoning is, in this part, unjustified, since the appellant should have stated why such circumstances are also relevant for the assessment of whether the plaintiff expressed an intention to apply for international protection, and how this, together with other evidence taken and assessed, could have affected the finding of facts.

39. After all, the appellant's allegations regarding the plaintiff's inconsistencies cannot challenge neither the findings of the reports on which the Court of First Instance relied on nor the circumstances of the plaintiff's treatment, in which the record of the offender's statement was drawn up on 15 August 2019. As the appellant has not disproved with its documentary evidence that an intention was expressed, the Supreme Court can only uphold the view of the judgment under appeal, that is that the plaintiff did not have an effective possibility of claiming the right to asylum. The appellant does thus also not argue in the appeal: that the entire record of the offender's statement was read to the plaintiff in a language he understands (so that he could dispute the accuracy of its content); that the said statement was part of a payment order, with the entire content of which he was informed of in his own language; that the plaintiff had the possibility to lodge an effective legal remedy against such a payment order (i.e. with the stated economic purpose of coming to Slovenia), which would have stayed his extradition to Croatia, and the possibility to state in that remedy a different reason for his presence in Slovenia. As regards the last, it is also not possible to overlook the undisputed findings that the plaintiff was arrested at 13.13 on 15 August 2019 and handed over to the Croatian authorities already at 10.00 the following day. In the Supreme Court's view, such a short period of time, in conjunction with the way in which the plaintiff was dealt with, contradicts the appellant's allegations that he had sufficient opportunities to prevent his extradition.

Objections regarding the incorrect refusal of the evidentiary proposals for the hearing of police officers

40. The appeal alleges that there has been an infringement of the rules of the administrative dispute procedure due to the inadequate reasoning as to why the hearing of police officers B.B and C.C. in connection with the procedure of the plaintiff's treatment at the police station Črnomelj was not carried out. The appellant therefore alleges a procedural infringement for failure to take the evidence proposed, in respect of which, however, the appellant is precluded.

41. In line with Article 286b(1) ZPP, a party must invoke an infringement of the procedural provisions before the Court of First Instance as soon as it is possible to do so. Infringements that are alleged at a later stage, including in legal remedies, are considered only if the party was unable to raise those infringements beforehand without any fault of its own. Pursuant to Article 287(2) ZPP, the Court rejects the proposed evidence with an order, in which it states the reasons for their rejection. It follows from these provisions that, if the Court has already, at the main hearing, given reasons for refusing to take the evidence proposed (as is confirmed by them being noted in the record of the main hearing), a party may object at the main hearing that its evidence was rejected on the grounds that are constitutionally impermissible.[7]

42. It is apparent from the record of the main hearing of 7 December 2020 that it was held in the presence of the appellant' counsel and that the Court adopted an order, rejecting certain evidence proposals, including the one for the hearing of the mentioned police officers (page 8 of the record, back of the sheet, sheet number 360). Three reasons were given for the refusal to their hearing (ensuring respect for the principle of equality of arms between the parties of the

[7] See e.g. decisions of the Supreme Court No. III Ips 106/2011 of 15 October 2013, X Ips 251/2017 of 25 April 2018, II Ips 303/2017 of 14 February 2019.

procedure; the proposed police officers did not interview the plaintiff when they were informed of the offence and did not write a record of the offender's statement on 15 August 2019 nor a police report on the plaintiff's arrest; given the number of illegal border crossings and police procedures, the Court expressed doubts as to whether the two police officers could accurately recall whether ten months ago the plaintiff at any point expressed an intention to seek asylum in Slovenia). At the same time, the Court also refused the proposal for the hearing of the plaintiff, with an explanation that he was not physically present in Slovenia and clearly had no possibility of coming to Slovenia, as well as that in such circumstances his hearing is not necessary for the reasons listed in the refusal of the proposal for the hearing of the two police officers.

43. It is apparent from the above that the appellant's counsel had the possibility of objecting to the rejection of the proposed evidence and the reasons for it, at the main hearing. It is not argued in the appeal that this was not possible, and therefore the infringements cannot be invoked only now. Moreover, the appellant explicitly objects only to the last of the listed reasons for the refusal to hear the two police officers, which means that even if this reason was inadmissible (in the sense of an impermissible prior evidentiary assessment because the Court did not ascertain the memory recollection of the mentioned police officers), the appellant was not (yet) able to secure their hearing.

44. In the light of everything mentioned, the appellant cannot succeed with its allegations of erroneous findings of fact and of procedural infringements in relation to the failure to take the evidence proposed. The Supreme Court therefore disagrees with the appeal that the plaintiff failed to prove that he had expressed an intention for international protection. He has proven this and thus met his substantive burden of proof by proving a fact that is in his favour. On the other hand, the appellant has not successfully challenged the said fact, since it has not proven that the plaintiff is an economic migrant and not a person seeking international protection and, furthermore, does not argue in the appeal that the plaintiff's alleged belonging to the Anglophone minority in Cameroon cannot by itself constitute a reason of persecution in the country of origin within the meaning of Article 27(1) ZMZ-1, and thus a circumstance on which the need for international protection could not be based. It is true that the Court of First Instance did not find any other circumstances that would confirm the appellant's submission that the expressed intentions for international protection are being respected. However, this is because the appellant did not allege them (e.g., the appellant did not claim that at the time when the plaintiff was being dealt with, concrete intentions for asylum were being accepted and considered).

On the application of substantive law

45. After such reasoning, the appeal cannot challenge the contested judgment in the part that holds that the extradition of the plaintiff to the Republic of Croatia was illegal, as it was carried out contrary to Article 36(1) ZMZ-1, which states that until an application is lodged, the applicant may not be removed from the Republic of Slovenia in accordance with the regulations which regulate the entry, exit and stay of aliens in the Republic of Slovenia. According to recital 27 of the Procedural Directive, applicants for international protection are persons who express their wish to apply for international protection, which is why, in accordance with Article 6(2)

of the Procedural Directive, Member States are obliged to ensure that the person making an application also has a real possibility of lodging it as soon as possible.

46. An individual might also not make a (formal) application. If they refrain from doing so out of unjustifiable reasons on their part, even though they have been enabled to do so, the State, based on Article 36(2) ZMZ-1, does not apply the mentioned provision of the Article 36(1). However, in the case of the plaintiff, the phase referred to in Article 36(2) ZMZ-1 has not (yet) been reached, nor could it have been reached, which all means that he has been prevented from accessing the asylum procedure as a result of his illegal extradition, which constitutes a violation of the fundamental right laid down in Article 18 of the Charter. At the same time, the Supreme Court notes that in the case of a lodged application (i.e., a written, formalised application), the extradition of an applicant to another Member State is possible, but only under the conditions laid down in the Dublin III Regulation,[8] when another Member State is competent to process the application. However, as can be seen from the second subparagraph of Article 3(2) of the said Regulation, the possibility for the applicant to oppose the extradition on the grounds that there is a well-founded presumption that there are systemic deficiencies connected to the asylum procedure and the reception conditions in the other Member State, which could give rise to a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, must also be ensured in this procedure. For this purpose, Article 4 also guarantees the right to be informed, inter alia, of the State to which they will be extradited.

47. The Return Directive could thus not be the basis for the extradition of the plaintiff to the Republic of Croatia, as applicants for international protection do not fall within its scope. This follows from Article 1 of the Directive, according to which this Directive lays down the procedures to be used in the Member States for the return of illegally staying third-country nationals, in accordance with fundamental rights as general principles of the Community law and the international law, including obligations relating to the protection of refugees and human rights. However, considering recital 9 thereof, third-country nationals who have applied for asylum in a Member State should not be treated as illegally staying on the territory of a Member State until the decision rejecting their application has entered into force. Another incorrect basis was also the Agreement/2006,[9] which, according to Article 2(1), refers to the extradition and reception of third-country nationals or stateless persons who do not or no longer meet the conditions for entry to the state territory of the requesting Contracting Party or the conditions for residence therein, and not to asylum-seekers.

48. After all, refusing entry to persons seeking protection is not in line with the Schengen Borders Code.[10] Its Article 14(1) states that the refusal of entry to the territory of the Member States to third-country nationals who do not fulfil all the conditions for entry laid down in

[8] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[9] Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the Extradition and Reception of Persons whose Entry or Residence is Illegal (Official Gazette of the Republic of Slovenia, International Treaties, No 8/06).

[10] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement.

Article 6(1) and who do not fall within the category of persons referred to in Article 6(5) does not interfere with the application of the special provisions related to the right to asylum and international protection or to the issuing of a long-stay visa.

49. In the light of the aforementioned, and since the plaintiff has made an application for international protection, the reasoning of the judgment under appeal is unnecessarily concerned with the question of whether an exception to the application of the Return Directive within the meaning of Article 2(2)(a)[11] was applicable in the plaintiff's case. Accordingly, the Court of Appeal did not address the appellant's submissions concerning the interpretation of the Return Directive and the Agreement/2006.

On the elimination of the consequences of the action

50. The Court of First Instance also ordered the appellant to remedy the unlawful state of affairs, thereby upholding the plaintiff's claim for the elimination of the consequences of the relevant act (fourth indent of Article 33(2) ZUS-1). As laid down in Article 66(1) ZUS-1, the judgment sets out what is necessary to remedy the infringement of human rights and fundamental freedoms and to restore the lawful state of affairs. In its reasoning (paragraph 459), the Court emphasised that it left it to the defendant to decide which permit to enter the territory of Slovenia would be the most effective way of accepting the plaintiff's application for international protection and in doing so, by way of example, listed a couple of options.[12]

51. The appellant argues that the obligation imposed is not enforceable because it has no legal basis in EU or national law. It argues, inter alia, that the ZMZ-1 and the ZTuj-2 do not provide for the possibility of lodging an application at the embassies of the Republic of Slovenia, that the embassy premises do not have the status of the territory of the Republic of Slovenia, and that the Republic of Slovenia has not decided to opt for the possibility of issuing visas for the purpose of entering the country for the reason of applying for international protection.

52. The claim of unenforceability is unjustified. The Republic of Slovenia is the one on which the obligation is imposed on and, through the competent State authorities, has all the means to enable (allow) the plaintiff to enter the Republic of Slovenia, including, if necessary, by adopting the relevant legal grounds (regulations). These would enable not only the plaintiff, but all similarly situated individuals, to have their application for protection reviewed and thus the State to act in accordance with the right to asylum laid down in Article 18 of the Charter.[13]

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[11] This provision states that Member States may decide not to apply this Directive to third-country nationals who have been received or intercepted by the competent authorities when illegally crossing the external border of a Member State and who have not subsequently acquired the right to reside in that Member State.

[12] E.g., by issuing a residence visa under the ZTuj-2 or the Visa Code; by the possibility of submitting an intention to apply for international protection at the Embassy of the Republic of Slovenia in Sarajevo, through which entry into Slovenia is granted at the border crossing point; by issuing another form of so-called single permits for crossing from one country to another, or by means of a special pass or permit.

[13] It follows, for example, from the judgment of the ECtHR in N.D. and N.T. v. Spain, nos. 8675/15 and 8697/15 of 13 February 2020, para. 34, that Spanish national law regulates the possibility of lodging an application at Spanish embassies and the cooperation of the ambassador in the transfer of asylum seekers to Spain.

Regarding the prohibition of collective expulsion

On the individual treatment of the plaintiff

53. The appellant does not object to the interpretation of the notion of prohibition of collective expulsion, as it follows the ECtHR's interpretation in Sultani v France (No 45223/05 of 26 September 2007) that the mere fact that several aliens have been subjected to the same measures by the State does not necessarily mean that there has been a collective expulsion, provided that they have been beforehand given an individual opportunity to express their views regarding the circumstances. However, the appellant argues that there was no collective expulsion in the plaintiff's case, as he was treated individually and was given the opportunity to express his views regarding his extradition to Croatia. This argument is not substantiated.

54. The purpose of the prohibition of collective expulsion is to ensure that the individual has procedural possibilities to present arguments as to why they must remain in the territory of the State, since there is a risk that they will otherwise be exposed to treatment that is contrary to human rights, inter alia, contrary to the prohibition of torture or inhuman or degrading treatment.[14] It therefore follows that the State authorities must ensure that each of the aliens has a genuine and effective opportunity to put forward the above-mentioned arguments. The State may therefore counter the allegation of collective expulsion (which, with reference to the extensive case-law of the ECtHR, is explained at length in the judgment under appeal at pages 78 to 84) if it can prove that the measure was taken based on an assessment of the specific case of each of the aliens in the group. Such an assessment necessarily presupposes that the person is given the opportunity to make a statement about these specific circumstances, which requires the authority to properly (fully) inform them.

55. Based on the explanation above, the appellant's submission that individual treatment was guaranteed cannot be upheld. Firstly, because the plaintiff's personal circumstances, which led him to apply for protection, were not examined when it was established that he had expressed an intention for asylum. It would have been possible to speak of an individual treatment if the appellant referred the plaintiff to the procedure under the ZMZ-1, after he had expressed his request, in which he would have had the opportunity to lodge a written request, regarding which the relevant authority would have to decide. In this procedure, the plaintiff would have had the opportunity to present arguments against the return to his country of origin, and such return would only take place after the rejection of the application for international protection.[15] Such treatment was also not guaranteed to the plaintiff in Croatia, since the Court of First Instance found as undisputed (as it was not contested) that the plaintiff was immediately removed to Bosnia and Herzegovina after his extradition to Croatia on 16th of August 2019, without being issued with a specific decision (paragraph 213 of the reasoning). This means that the plaintiff was also not issued a return decision by the other Member State and that his personal circumstances were not assessed by that State.

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[14] Ibid., para. 198.

[15] Such are, for example, the cases before the ECtHR in Sultani v France, no. 45223/05 of 26 September 2007; M.A. v Cyprus, no. 41872/10 of 23 July 2013.

56. Furthermore (i.e., without considering the plaintiff's status as an asylum seeker), the Court of First Instance convincingly explained that the plaintiff did not know that he would be extradited to Croatia and was therefore also not able to state the circumstances related to the risks of extradition to the said country. It is true that the plaintiff was issued with a detention order in Slovene for extradition to foreign security authorities, but the appellant does not claim that the order stated to which authorities he was to be extradited (i.e., to Croatian authorities) and that this was explained to the plaintiff in English. At the main hearing, the appellant confirmed the lack of providing information by stating that it stands by the statements made at the previous main hearing. There, on 19 June 2020, it stated that a record of the extradition and the takeover of the persons had been signed as provided for in the agreement and that no specific explanations to the plaintiff prior to that or prior to the return were indeed evident. The question, however, is how the return under that agreement would have been carried out and what problems the police officers would have faced had they informed the aliens in advance (page 3 of the record of 19 June 2020, Document No 139).[16]

57. From the aspect of the prohibition of collective expulsion, it is also irrelevant in itself what the rights of the detained person are (these are set out in Article 67 ZNPPol) and that such a person has the possibility to use a legal remedy against the detention order. It was established at the first instance, and is in fact confirmed by the appeal, that the plaintiff was subjected to a procedure which was conducted without an interpreter, while it is also not evident that the documents were translated into English for him. The appellant can therefore not challenge the contested judgment's finding that the plaintiff was not granted individual treatment before being extradited, by referring to the detention order issued.

58. It is true that at the time of his detention, the plaintiff was still undergoing a minor offence procedure for illegal border crossing. However, the procedure had no connection with his extradition to Croatia, but rather with his entry into the territory of the Republic of Slovenia. Thus, the appellant also did not argue in the proceedings that the extradition to the neighbouring State constituted an act in the execution of the payment order issued in the minor offence procedure, but rather justified the extradition on the basis of the enforcement of the Agreement/2006. Therefore, the appellant's submission that the treatment of the plaintiff in the field of the minor offence law amounted to his individual treatment in the context of ensuring the prohibition of collective expulsion, and that a different position is inadequately reasoned and unsupported by any case-law in the judgment under appeal, is unjustified.

59. In addition, the Court of First Instance explained in the judgment under appeal that not even the record of the offender's statement on 15 August 2019 shows which question the plaintiff answered by stating that he wished to go to France for economic reasons. The appellant contests this by arguing that the statement itself shows that the plaintiff was asked why he left his country of origin. In the Supreme Court's view, however, such a question, if it had been posed, only requires an answer on the circumstances of the departure from the country of origin, but does

[16] It then further proposed the taking of informative evidence, which in principle is not permitted, stating that the counsel was not familiar with the detailed practice of returning aliens and with this agreement, and that it would therefore be good if the two police officers who had already been proposed as witnesses would give their statements on the matter.

not constitute a notification to the plaintiff that extradition proceedings to the Republic of Croatia are being conducted against him, nor does it suggest that he should make a statement in relation to his return to Croatia,[17] least of all in the situation of an expressed request for international protection.

60. The submission that the plaintiff knew about his removal to Croatia is also unjustified, as he was returned to Croatia after the previous hearing in April 2019 at Ilirska Bistrica police station. What the plaintiff foresaw on 15 and 16 August 2019 due to his previous extradition to the Croatian security authorities is, given the fact that he had expressed an intention for international protection, purely hypothetical. What is relevant is what the plaintiff was informed of prior to his extradition. In that respect, as explained above, the plaintiff's treatment in the context of the minor offence procedure, and the detention order issued, are not sufficient.

61. For establishing a violation of the prohibition of collective expulsion, it is irrelevant whether the plaintiff should have been issued with a return decision to Croatia within the meaning of the Return Directive. The lawsuit was not filed because the extradition was illegal due to the failure of issuing a return decision from Article 6(1) of that directive, which provides that Member States are to issue a return decision to any third-country national who is illegally residing within their territory, without interfering with the exceptions in paragraphs 2 to 5 of Article 6. In terms of the circumstances relevant to the declaration of a collective expulsion, in the present case, the failure to issue another decision (in addition to the detention order and the payment order) is merely an additional fact, which shows that the plaintiff could not, even if he had received another decision, know of his return to Croatia and used a legal remedy against it.

62. In the light of the foregoing, the appellant has also failed, in the Supreme Court's view, to meet its burden of proof with regards to the claim that the plaintiff was granted individual treatment. Consequently, the submission that the plaintiff did not 'take the opportunity' to explain why he should have remained in the Republic of Slovenia is unjustified. If nothing else, he had already expressed that intention by stating his intention to apply for asylum.

63. In its judgment, the Court of First Instance also dealt with the general social context in which the treatment of the plaintiff by the police took place. It highlighted, inter alia, the statistics on the number of filed applications for international protection in individual periods in 2018 as well as the instruction of the Director General of Police issued on the 25 May 2018 (paragraphs 265 and 266 of the reasoning of the first-instance judgment). The latter requires police officers to make a mandatory notification to the Croatian security authorities immediately upon arresting an alien, in accordance with the Agreement/2006, which led the Court to conclude that the notification has to be made before the police officer has conducted an interview with the alien, in which his personal circumstances would have been validly and objectively examined in the sense that he would have been able to defend himself against the

[17] It is, among other things, evident from Asadi and Others v Slovakia, no. 24917/15 of 24 March 2020, that documents signed by the applicants and the interpreter, including transcripts of oral interviews relating to the illegal border crossing, were submitted in the proceedings before the ECtHR, and that the transcripts showed that, when asked by the police whether they had suffered persecution in their country of origin and whether they wanted to apply for asylum in Slovakia, the applicants replied with “no", stating that they had left Afghanistan for economic reasons and that they wanted to go to Germany para. 7).

return. On the other hand, the Court pointed out that the instruction does not provide guidance on how to interview an alien.

64. Whether the above-mentioned information and instructions, as well as the additional warnings of the Ombudsman of the Republic of Slovenia in the report from 15 February 2019 on the risk of inattentive listening to an alien, indicate a risk of infringement of the right to the prohibition of collective expulsion, is not really relevant in the case at hand, since it is sufficient to establish that the plaintiff was not guaranteed an individual statement and verification of the circumstances connected with his return to the country of origin or to Croatia. The Supreme Court therefore does not reply to the appellant's submissions concerning the understanding of the instruction and the statistical data on the intentions to apply for international protection that had been made at the Črnomelj police station.

On the principle of mutual trust

65. The appellant's submissions are centred on the assertion that, in extraditing the plaintiff to the Republic of Croatia, the appellant acted in accordance with the principle of mutual trust between EU Member States. It argues that this principle is only called into question if the existence of systemic deficiencies in the treatment of aliens in another Member State has been established and proven in the judgments of the ECtHR and the CJEU.

66. An appeal with such an unsubstantiated statement cannot challenge the interpretation of the Court of First Instance. Its position, which is shared by the Supreme Court, is that the presumption that all Member States respect fundamental or human rights is rebuttable and that, in such cases, the competent authority is obliged to assess the existence of a real risk of inhuman or degrading treatment in another Member State. If it cannot exclude this risk, it must obtain specific guarantees from the other Member State that the right will not be violated (pages 105 to 113 of the judgment under appeal). In this respect, the Court refers to the case-law of the CJEU, inter alia, the joined case of Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen (C-404/15 and C-659/15 of 5 April 2016), which it summarises in paragraph 295 of the reasoning. As the Supreme Court notes, the CJEU, in the above-mentioned judgment concerning the extradition of a person to another Member State on the basis of the European Arrest Warrant, states that the competent authority, when assessing the risk, must rely on objective, reliable, accurate and properly updated data regarding the situation in the other Member State, which prove either actual systemic or general deficiencies concerning certain groups of persons or certain other relevant circumstances. It emphasises that this data may be derived especially from international judicial decisions, such as those of the ECtHR, from judicial decisions of the issuing Member State and from decisions, reports and other documents of the Council of Europe or United Nations bodies (paragraph 89 of the judgment).

67. It is therefore evident that such acts are listed by way of example and that, contrary to the appellant's view, their circle is not exhaustive.[18] In this respect, it is irrelevant that the above-

[18] As regards the existence of doubts as to whether the authorities of the Republic of Croatia ensure respect for the human rights of returned aliens, the Court of First Instance also relied on the report of the Ombudsperson of the Republic of Croatia of 16 September 2019. The report indicates that at the end of March 2019, the Ombudsperson received an anonymous complaint from a border police officer, who stated that all migrants and refugees were being returned to Bosnia and Herzegovina without paperwork and processing, that their property was being taken,

mentioned position was expressed in the context of the execution of the European arrest warrant, as the existence of a real risk of inhuman or degrading treatment in another Member State is a question that may arise in all cases of measures for the removal of an alien from the territory of a Member State. It is true, as the appeal points out, that it is not possible to exclude with certainty that a Member State may act differently despite the guarantee given.[19] In such a case, however, the State that has extradited the person cannot be blamed for not having done what it could have done to avoid exposing the person to the risk of inhuman or degrading treatment. On the other hand, the guarantee is important for maintaining compliance with the principle of mutual trust. As it follows from the judgment under appeal, it gives the other Member State the opportunity to remedy the deficiencies and to re-establish trust between the States as soon as possible, rather than destroying that trust by immediately refusing removal (paragraph 300 of the reasoning of the judgment under appeal). Thus, in the field of the common asylum policy, the Republic of Slovenia has already established the practice of obtaining guarantees from the other Member State.[20]

68. The Supreme Court therefore rejects the appellant's position that the requirement of a guarantee interferes with the sovereign rights of another State. At the same time, the appeal does not even explain how the sovereignty of another State is relevant in view of the State authorities' duty to act, especially given the fact that the appellant itself emphasises its commitment to respect the provisions of the Charter and the ECHR.

On the plaintiff's contribution to the collective expulsion

69. The appeal further points out that the plaintiff had the possibility to legally enter the Republic of Slovenia at the entry border point with an identification document. Since the appeal refers in this respect to the decision of the ECtHR in N.D. and N.T. v Spain (nos. 8675/15 and 8697/15 of 13 February 2020), it apparently takes the view that the Supreme Court should have also taken it into account in the present case. This however is unjustified.

70. The conduct of the alien may be relevant if they have deliberately caused the inability to assess the individual circumstances.[21] Cases of illegal border crossing also fall within this scope. Illegality, however, is not sufficient on its own, but only in combination with other circumstances. As is evident from the case of N.D. and N.T. v Spain, such circumstances mean exploiting the size of the group crossing the border and using force in doing so with the intention of creating a situation which is difficult to control, and which endangers public security (paragraph 201 of the judgment). It is therefore a question of creating a situation in which individual treatment is not possible.

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that there were particularly cruel police officers assigned to assist them from other police administrations, who beat, take, or do whatever they want, without control. Despite the Ombudsperson's request to the Public Prosecutor's Office of the Republic of Croatia to conduct a proper, effective and independent investigation into the unlawful actions of police officers following orders from their superiors, no such investigation has been carried out, and no feedback on the verification of the allegations made in the complaint has been received, not even from parliamentary officials (paragraph 341 of the judgment under appeal).

[19] The Member State's actions that were contrary to its own guarantee would in fact confirm that in its case it is no longer merely questionable whether, as an EU Member State, it respects the common values on which the EU is founded and the obligations arising therefrom, including the commitment to respect human rights.

[20] See CJEU judgment in C.K., H.F., A.S. v Slovenia, C-578/16 of 16 February 2017, para. 34.

[21] In this sense, the ECtHR in Hirsi Jamaa and Others v Italy, no. 27765/09, of 23 February 2012, para. 184.

71. Since no comparable circumstances of entry into the territory of the Republic of Slovenia were claimed in the present case, the appellant's reference to the above-mentioned case before the ECtHR is not appropriate, as it ignores its factual situation and the related interpretation on the relevance of the aliens' conduct for the implementation of the proper procedures.

72. For the reasons given, the judgment under appeal is also lawful in this respect, since the fact that the plaintiff was not informed about the procedure of extradition to Croatia is essential for the decision. Since, prior to the extradition, the plaintiff was undisputedly only issued with a detention order for the purpose of extradition to unnamed foreign security authorities, to the extent and in the circumstances of the proceedings previously mentioned, it cannot be considered that he could have effectively defended himself against the intended extradition. The appellant also does not dispute that it is obliged to comply with the provisions of Article 19 of the Charter and the ECHR when implementing the bilateral agreement.

On the breach of the principle of non-refoulement

73. In accordance with Article 19(2) of the Charter, no one may be removed, expelled or extradited to a State where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Article 4 states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

74. Article 52 of the Charter (entitled "Scope of rights and principles and their interpretation") states in paragraph 3 that in so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

75. It is apparent from this provision that the content of the rights protected under both international legal instruments is comparable, from which it follows that the interpretation of Article 4 and Article 19(2) of the Charter must also consider the case law of the ECtHR. This is also confirmed by the Explanations relating to the Charter of Fundamental Rights,[22] namely that the reference in Article 52(3) of the Charter to the ECHR covers the Convention and its Protocols, with the content and scope of the rights guaranteed determined not only by the text of these instruments, but also by the case law of the ECtHR and the CJEU. It is emphasised that the level of protection guaranteed by the Charter must never be lower than that guaranteed by the ECHR. With regards to the provision of Article 19(2), the Explanations state that this provision incorporates the relevant case law of the ECtHR with regards to Article 3 of the ECHR. The CJEU has also regularly pointed out in its judgments that the case law of the ECtHR with regards to Article 3 of the ECHR must be considered when interpreting Article 4 of the Charter.[23]

76. In its case-law on the violation of Article 3 ECHR (in the context of which ECtHR examined the violation of the principle of non-refoulement; in the same way the Slovenian Constitutional Court, in the context of Article 18 of the Constitution on the prohibition of torture, examines the violation of the above-mentioned principle), the ECtHR has adopted the position that the

[22] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

[23] See judgments in C.K., H.F., A.S. v Republic of Slovenia, C-578/16, of 16.2.2017, para. 68; Elgafaji v Staatssecretaris van Justitie, C-465/07, of 17 February 2009, para. 28; Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussi Abdidi, C-562/13, of 18 December 2014, para. 47.

removal, expulsion or extradition of an individual to another State is prohibited when there are compelling reasons to conclude that there is a real risk of that person being exposed to torture or to inhuman or degrading treatment or punishment.[24] The principle of non-refoulement prohibits both direct refoulement and indirect refoulement, where the asylum seeker is extradited to a country in which, although there is no imminent serious risk that they will be exposed to inhuman treatment, there is a possibility of them being extradited from that State to a State in which there is a serious risk that they will be exposed to inhuman treatment.[25]

77. The principle of non-refoulement therefore ensures that an individual will not be returned to another State without the State authorities having assessed whether that State is safe for them. Given the rebuttable presumption of mutual trust between EU Member States and given that the ECtHR case-law on Article 3 ECHR is taken into account when considering the prohibition set out in Article 19(2) of the Charter, the principle of non-refoulement must also be respected in the context of the implementation of measures between Member States. This in turn imposes an obligation on a Member State not to remove an individual from its territory if there is a risk of conduct constituting a violation of Article 4 of the Charter in the receiving country (EU Member State), as the CJEU has explicitly confirmed in connection with the transfer of an asylum seeker in the context of the implementation of the Dublin system. Namely, in the joined cases of N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (C-411/10 and C 493/10 of 21 December 2011), it pointed out that it is possible that the transfer of asylum seekers under the Dublin system may not, in certain circumstances, be compatible with the prohibition enshrined in Article 4 of the Charter. It stated that the asylum seeker would be at real risk of inhuman or degrading treatment within the meaning of that Article if they were to be transferred to a Member State where there is a serious risk of systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers. Consequently, in accordance with the prohibition laid down in the said Article, Member States may not carry out a transfer if it is not possible for them no to be aware of such deficiencies in that Member State (paragraphs 86 to 94 and paragraph 106 of the judgment). It further follows from the judgment that the appropriate instruments for assessing whether the responsible Member State respects fundamental right are the data, as those noted by the ECtHR, including regular and coherent reports by international non-governmental organisations that show actual problems in the country of destination (expressly paragraphs 90 and 91 of the judgment).

78. Since the principle of non-refoulement refers to State measures that require the individual to leave the State's territory, the existence of a real risk that the individual will be exposed to prohibited treatment is assessed in the light of the circumstances that existed at the time the measure was taken, and that were known or ought to have been known to the State authorities.[26] Such an approach to assessment also applies in cases where the measure has been carried out, since under the principle at issue the State is responsible for having exposed the individual to a

[24] See ECtHR judgement in Soering v the United Kingdom, no. 14038/88, of 7 July 1989, para. 91.
[25] See ECtHR judgments in M.S.S. v Belgium and Greece, no. 30696/09, of 21 January 2011, para. 286; Ilias and Ahmed v Hungary, no. 47287/15, of 21 November 2019, para. 113.
[26] E.g., Hirsi Jamaa and Others v Italy, no. 27765/09, of 23 February 2012, para. 121.

foreseeable risk of unacceptable treatment.[27] This reflects the absolute nature of the right enshrined in Article 3 of the ECHR, due to which its exercise cannot be left to chance. The State is therefore also obliged to consider and assess the risks that might jeopardise the respect of the values guaranteed by this provision of the ECHR. It follows that it is already in breach of its duty connected with ensuring the respect of the prohibition of torture, inhuman or degrading treatment if, when removing a person from its territory to another State, it incorrectly assesses, based on the information available, the risk of exposure to treatment contrary to Article 3 ECHR, or if it fails to make such an assessment at all.

79. In this respect, the State's responsibility exists irrespective of whether the person was in fact subsequently exposed to treatment contrary to Article 3 ECHR in the other State. The Supreme Court therefore rejects the appellant's submission that there can be no violation of the principle of non-refoulement because the plaintiff was not exposed to inhuman treatment in Croatia and Bosnia and Herzegovina.

80. The Supreme Court further notes that the plaintiff claimed in his lawsuit that he had not had the opportunity to make a statement against the extradition to Croatia, but that at the time there were reports from NGOs that the Croatian authorities were systematically not handling the extradited persons, but instead deporting them to the territory of Bosnia and Herzegovina, while also treating them in a violent manner and destroying their property. The plaintiff further claimed that, in the light of these reports and the media coverage of the activities of the Croatian police, Slovenia should have been aware of the systemic deficiencies in the treatment of aliens crossing the Croatian border illegally from Bosnia and Herzegovina, as well as of the treatment of aliens handed over by the Slovenian police.

81. He thus argued, inter alia, that Croatia was not a safe country for him as a member of a group of aliens intercepted and returned from Slovenia for illegally crossing the border, since there was a serious risk that he would be exposed to police violence. In doing so, he also challenged the presumption that the Republic of Croatia respects the prohibition of torture and inhuman and degrading treatment of the migrants concerned.

82. The Court of First Instance established the existence of a well-founded risk, which requires the defendant to assess the risk of exposure of the plaintiff to prohibited treatment, on the basis of the reports assessed on pages 144 to 146 of the judgment under appeal, including the reports of AIDA/ECRE and Amnesty International. It is further evident from the judgment that the Slovenian police even received Amnesty International's 2018 report and responded to it on 10 July 2018 (point 365 of the reasoning), with this report describing the conduct of the Croatian police during the persecution of persons towards Bosnia and Herzegovina (beatings, hits with sticks; point 327 of the reasoning). On the other hand, the Court assessed that the response of the Ministry of the Interior of the Republic of Croatia to the Human Rights Watch report,[28] which was submitted by the appellant, did not outweigh the reports of various State, non-governmental domestic and international institutions, networks, and organisations that are

[27] Cruz Varas and Others v Sweden, no. 15576/89, of 20 March 1991, para. 76; Vilvarajah and Others v the United Kingdom, nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, of 30 October 1991, para. 107.
[28] It contains claims that this is a false accusation of violence by police officers, supported by those who are trying to put pressure on the Croatian police, which does not allow illegal entries into the country.

continuously engaged in monitoring the situation of aliens on the so-called Balkan route. The reason for this is the general nature of that response and the fact that it is a response from a State institution responsible for the treatment of aliens (paragraph 372 of the reasoning). It is also evident that the Court of First Instance did not, ex officio, find the reports of the Croatian State institutions (paragraph 369 of the reasoning).

83. In the Supreme Court's view, all the information referred to above also established an obligation on the appellant to consider this information in such a way that based on it, it would assess whether Croatia is a safe country for the plaintiff. Such reports should have been known to the Republic of Slovenia or its authorities responsible for extradition, since they relate to the area of their competence, in the exercise of which they are bound to respect human rights. This also implies the appellant's duty to follow up on reports on the situation in Croatia. With regards to this the appellant does not argue in the appeal that the reports were not publicly available (e.g. on the internet) and had even received one of them directly and responded to it. Therefore, its objection that the plaintiff did not provide such information in the proceedings by testifying that he was persecuted in the Republic of Croatia, that he was afraid of being returned, and that no questions of systematic deficiencies were raised within the European institutions, thereby leaving no grounds for doubt regarding the deficiencies in the treatment of this group of aliens in Croatia, is unjustified.

84. It is evident that the appellant did not make the required assessment on the basis of the above-mentioned reports, since it follows from the judgment under appeal that it only defended itself by arguing that it was not required to do so because Croatia is a member of the EU (paragraph 375 of the reasoning). In the appeal, the appellant also reiterates that it had sufficient knowledge of the situation in the neighbouring State when it concluded that the findings of the European Commission in its communication of 22 October 2019 regarding the verification of the overall implementation of the Schengen acquis in Croatia were an adequate guarantee of the conduct of the Republic of Croatia.

85. Referring to that communication is unjustified, as it was issued later than the date on which the extradition was carried out, and as it is therefore unclear how the appellant could have been aware of it as early as on the 16 August 2019. The appellant's submissions based on that report, which refers to the evaluation of police cooperation carried out in June 2016, were justifiably rejected by the Court of First Instance on the merits, as they extend beyond the purpose, scope and content of the assessment set out in the report. Namely, this refers to the general assessment of the fulfilment of the conditions required for the application of the Schengen acquis in the field of the returns in Croatia, which is dependent on the further alignment and implementation of the Croatian Law on Aliens with the provisions of the Return Directive. In this regard, it is particularly emphasised that, of the ten special commitments set out in Annex VII of the 2011 Treaty of Accession, the continued compliance with six of these commitments, including the commitment to further improve the protection of human rights, is relevant to the Schengen acquis.

86. In view of the foregoing, the appellant cannot, merely by referring again to the contents of the said report nor to the other documents referred to in its appeal or by its reassessment of those documents, challenge the findings of fact established before the Court of First Instance,

either in connection with the breach of the principle of non-refoulement or with the prohibition of collective expulsion and the expressed intention to seek asylum. This is because the appellant's arguments do not go beyond the fact that it disagrees with the findings of fact.

87. The appeal further argues without merit that the judgment is incomprehensible in that it does not draw a definitive conclusion from the circumstances established. While section D.3 of the first-instance judgment is devoted to the presentation of information on the situation and treatment of migrants in Croatia and on the living conditions of migrants in Bosnia and Herzegovina (pages 112-143 of the judgment), the assessment of the relevant documents in the light of the established violation of the principle of non-refoulement is established in section D.4.1. It is also not true that the Court of First Instance failed to state reasons for its declaration that there had been a breach of the plaintiff's procedural obligations in relation to the implementation of the principle of non-refoulement. It is true that it did not do this in paragraph 402 of the judgment, which is emphasised in the appeal, but rather in paragraphs 361 to 379 of the reasoning.

88. Since, in the light of the foregoing, the appellant cannot challenge what has been established in the ruling of the judgment under appeal, that is, that the principle of non-refoulement was violated by the extradition of the plaintiff to Croatia, the Court of Appeal did not examine the appellant's remaining submissions in so far as they relate to the situation in Bosnia and Herzegovina (inter alia, that there is no causal link between the conduct of the Republic of Slovenia and the situation in Bosnia and Herzegovina; that there is a comparable international protection procedure in Bosnia and Herzegovina, from which the plaintiff is apparently also not at risk of being returned to his country of origin or to another third country, since he has been there for almost a year since his second return).

In conclusion

The remaining submissions are not essential to the decision. Since the reasons which the Court of Appeal is required to consider ex officio (inter alia, that the judgment under appeal is reviewable) have not been established, the Supreme Court rejects the appeal as unjustified (Article 76 of the ZUS-1).

On point II of the ruling of the judgement

89. The Court shall decide on the costs of the proceedings only on a specific request by the party (Article 163(1) ZPP), in which it must specify the costs for which it seeks reimbursement (Article 163(2)).

90. The plaintiff requested reimbursement of the costs of the appeal proceedings but did not specify them. The Supreme Court therefore rejected the request.